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Universal jurisdiction

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Dedication

I dedicate my research work to my beloved family and many friends.
A special feeling of gratitude to my loving parents, whose words of encouragement and push for tenacity have been always a ring in my ears.
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Contents

Abbreviation

- International Court of Justice **(ICJ)**
- Human Rights **(HR)**
- International Humanitarian Law **(IHL)**
- International Law **(IL)**
- International Criminal Tribunal for the Former Yugoslavia **(ICTY)**
- International Criminal Tribunal for Rwanda **(ICTR)**
- Permanent International Criminal Court **(ICC)**
- Rome Statute of the International Criminal Court **(Rome Statute)**

Introduction

For ages, the world has been experiencing many violations to the IL, IHL, and HRL; these violations were usually during armed conflicts. Recently, people around the world suffered from war crimes and crimes against humanity, and even in some areas genocide is being committed against innocent women and children. Unfortunately, victims were unable to prosecute the suspects for many reason, most importantly the ability to reach to courts.

Universal jurisdiction, is an essential tool of international justice, which allows states or international organizations to claim jurisdiction over serious crimes, regardless who the accused person is, his nationality, country of residence, or any other considerations. So it is all about the nature of the crime, not the criminal, nor the state exercising jurisdiction over such crime.

This principle has been traditionally asserted only with piracy, this basis of jurisdiction has been refreshed after the grave violations of human rights that have occurred since the 1990s.

States still fight the use and practice of this principle as it reduce the benefit of the immunities and may violates the sovereignty of these states over their territories. But I think it is a very important principle and states should encourage its use to provide justice and fairness all over the world, and to prevent the powerful states and individuals from keeping committing violations which of international concern.

« Injustice anywhere is a threat to justice everywhere »

Martin Luther King

Chapter 1

1.Introduction.

As a starting point to the study of universal jurisdiction, I need to bring everybody's attention to the idea that the definition of the universal jurisdiction varies between authors, and that is because each one defines it from his or her own point of view and regarding to specific categories of offence or other ideas.

All national legal systems must include rules for determining types of crimes and individuals covered by it. Usually, national laws apply to people living inside the territory of the country and to crimes committed within the same territory.

Universal criminal jurisdiction is the assertion of jurisdiction over conduct committed outside the territory of the state asserting jurisdiction over the actions of a national of one state against a national of another. It is the assertion of jurisdiction over an act that has no link to the state exercising it in terms of the locus of the crime or the nationality of the offenders or victims. Having traditionally been asserted only with piracy, this basis of jurisdiction has been revitalized in the aftermath of the grave violations of human rights that have occurred since the 1990s.[1]

1.1.Definition.

To understand this concept, it might be useful to clarify the meaning of jurisdiction under international law.

Oxford dictionary defines jurisdiction as "the territory that a legal authority extends over".[2]

Antonio Cassese defined the universal jurisdiction as the principle which empowers the state to bring to trial persons accused of international crimes, regardless the place of commission of the crime, or the nationality of the author or the victim.[3]

[1] Modalities of the Exercise of Universal Jurisdiction in International Law, Mari TAKEUCHI, thesis for the Degree of PhD, School of Law College of Social Science, University of Glasgow, August 2014
[2] The Concise Oxford Dictionary of Current English (8th ed.) Clarendon Press, Oxford.
[3] Universal jurisdiction only for the international criminal court, LL.M.SHORT THESIS, BY: Farid Nabili, 2008, P.20.

Classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'[4]

As a general definition of the universal jurisdiction in Princeton principles is given as follows:

"Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[5]

The basis of universal jurisdiction is to be found in international criminal law and public international law, in conventions and customary law. It exists in order to combat impunity. "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or the convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[6]

Pursuant to that universal jurisdiction, for example: a dictator from South America accused of torturing people in his own country can be arrested in UK on a warrant issued by a Spanish judge, as happened in 1998 to General Pinochet, the former president of Chile.

Although the universal jurisdiction is one of the most important principles of international law, it still remains one of the most confusing doctrines of modern international law.

From all the definitions shown above, that universal jurisdiction can be described as follows:

Universal jurisdiction, an essential tool of international justice, which allows states or international organizations to claim jurisdiction over serious crimes, regardless who the accused person is, his nationality, country of residence, or any other considerations. So it is all about the nature of the crime, not the criminal, nor the state exercising jurisdiction over such crime.

1.2. Importance of prosecuting using universal jurisdiction.

Universal jurisdiction is presented as an initial step toward universal justice; whereby the protections of international law may be extend to all individuals without discrimination.

Universal jurisdiction is an important mean of reducing the unevenness in the landscape of international justice, where officials from more powerful states-or those protected by powerful

[4] International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences', 2000, p. 2.
[5] (Macedo, 2001), p.28.
[6] (Macedo, 2001)

states-are less vulnerable to justice than those from weaker governments. This is an unfortunate reality that the responsible use of universal jurisdiction can, over time, help to mitigate.[7]

The Principle and Practice of Universal Jurisdiction highlights the goals associated with international criminal prosecutions, particularly as these relate to obtaining justice, supporting the rule of law, promoting deterrence, and ensuring victims' rights to an effective judicial remedy. It is concluded that universal jurisdiction constitutes an essential, long-established component of international law.

I. To obtain justice.

This is superficially the most obvious justification for universal jurisdiction prosecutions. When terrible offences to which universal jurisdiction could be applied are committed. And justice cannot be achieved; the universal jurisdiction will be the appropriate tool to prosecute.

Universal jurisdiction was an institution of international law, and one of "exceptional character" towards the strengthening of justice.[8]

The principle should be applied only in the interest of justice and not for political reasons.[9] However, universal jurisdiction is still insufficiently used by States reluctant to jeopardize their economic or diplomatic interests.

Also universal jurisdiction provides victims of international crimes with access to justice. Because, courts in the "territorial state" are usually inaccessible for victims, for many reasons such as the availability of domestic immunities. For example, a domestic amnesty law in Chile protected former dictator "Augusto Pinochet" and other government officials in Chile, but the law was not able to stop proceedings filed against him in Spain using the doctrine of universal jurisdiction by victims who managed to escape his dictatorship. [10]

This case forms a very good example for the application of universal jurisdiction in field of justice when domestic prosecution is unavailable.

[7] https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction
[8] OCTAVIO ERRÁZURIZ (Chile), speaking for the Rio Group of countries.
[9] ANNIKEN ENERSEN (Norway)
[10] Universal Jurisdiction (Factsheet), center for constitutional rights, December 7, 2015

II. To deter violations of rights.

It is commonly argued that universal jurisdiction prosecutions can stop specific human rights abuses by leading to the arrest of those responsible, and over time can deter future abuses by creating fear of prosecution in those who might commit them.[11]

Practically, it is very difficult to initiate successful prosecutions abroad against individuals responsible for current abuses. Also persons responsible of such abuse will be less likely to travel to states with such jurisdiction. Still, prosecutions abroad can take place against those currently accused of human rights abuses, this would act as a deterrent, at least in the case of those accused.

III. To support the rule of law.

No one is above the law. It was the responsibility of each State to uphold the rule of law and fairness, and international law.

As ZWELETHU MNISI (Swaziland) said: "Justice is responsibility," justice could never achieve its impact when "executed with vendetta". Thus, the extraterritorial judicial intervention from "thousands of miles away" was an "unswerving attack" on sovereignty.

The principle of universal jurisdiction, used in good faith, was a powerful tool for the preservation of the international community's fundamental values, for the protection and promotion of the rule of law and human rights, and for the advancement of the fight against impunity.[12]

Finally, the rule of law requires that all persons and institutions are equal before and under the law.[13] Thus, States have an international obligation to pursue perpetrators of international crimes relentlessly, over and above political considerations.

IV. To reveal the truth.

One of the merits of universal jurisdiction prosecutions is that they help to reveal the truth and establish an official record of what occurred. If past abuses remain shrouded in secrecy and denial then there is little basis for societies to move forward. Victims and communities that suffered will always bear a legitimate grievance. For countries in transition to democracy,

[11] (Bringing human rights violators to justice abroad., 1999) p. 11.
[12] KABANDA LOPA CHILEKWA (Zambia)
[13] (Bringing human rights violators to justice abroad., 1999) P.13.

unacknowledged graves will prove a shaky foundation on which to build the rule of law. This principle is related to the right to know the truth about gross violations of human rights and serious violations of international humanitarian law.

V. To register international concern.

Universal jurisdiction prosecutions illustrate effectively the basic principle that serious human rights violations are the concern of everyone, not just the people in the country where they were committed. When a foreign country decides to prosecute crimes that occurred in another land, regardless of whether its own nationals were victims, it demonstrates the international dimension to basic human rights. The very fact that these prosecutions challenge traditional attributes of sovereignty and the immunity of leaders to commit grave abuses within their own national borders is a basis upon which prosecution should be advocated.[14]

VI. To promote social reconciliation.

Some maintain that well-publicised prosecutions abroad can promote social healing because they expose the facts and provide victims with at least some satisfaction. On the other hand, it is argued that prosecutions can stir up bitterness and conflict and delay social recovery. There is little empirical evidence for such a view. In Chile, for example, there is no indication, so far, that Pinochet's arrest has endangered Chilean democracy, as some commentators argued it would. Indeed, many believe that, by removing Pinochet from the scene, democracy in Chile has been strengthened.[15]

2. History and foundation.

2.1. Theoretical foundation of the universal jurisdiction.

Pirates have been around for centuries. However, the true legacy that pirates leave behind has been diminished. Their legacy has been ratified to downplay their monstrosities. They were marauders of sorts, pillaging lands and raping women.[16] Sometimes pirates would be seized overseas, but there was no way to punish them for the crimes committed abroad because that country had no jurisdiction, no right, to penalize them. Within this gap in the justice system is where universal jurisdiction was created.

[14] (Bringing human rights violators to justice abroad., 1999) P.16.
[15] (Bringing human rights violators to justice abroad., 1999) P.14.
[16] (Lett., 2015)

Pirate crimes were committed in international waters, where no country had territorial jurisdiction. Universal jurisdiction was created to allow countries the opportunity to prosecute this set of crimes.

There are two main types of universal jurisdiction. The traditional, or "customary,"[17] universal jurisdiction that was first established is exercised over crimes committed in international waters, where no country has jurisdiction. The other form of universal jurisdiction is exercised by international tribunals or through Conventions, where the tribunal or state has jurisdiction by becoming a party to the treaty. universal jurisdiction exercised through Conventions covers all aspects of the overarching principle.

The existence of universal jurisdiction, in its customary fashion, is limited because tribunals, like the International Criminal Court, and Treaties, like the Hague Convention, have replaced many traditional universal jurisdictional functions, and will likely replace all of them in time. The legitimate assertion of authority by a state or country to affect its legal interest is the meaning of the term "jurisdiction."[18] this principle depends on international law principles that creates cooperative relations between nations.

In classic international law, sovereignty prohibits any state to assert criminal jurisdiction over offences in another state by nationals of any other state. However, some international crimes are omitted from this prohibition, on the basis of universal jurisdiction.

The classic view on jurisdiction in international law was formulated in the 1927 SS Lotus case. The question here was whether Turkey could prosecute a French sailor for negligence. The PCIJ found that any State might exercise universal jurisdiction, unless there is a specific rule preventing the State from doing so.[19]

2.2. History of universal jurisdiction.

The principle of universal jurisdiction provides the State with jurisdiction over a criminal act without requiring a territorial or national connection to the criminal act.

Universal jurisdiction is a modern legal principle. Prior to World War II, the right to prosecute the criminal acts was an exclusive national matter, connected to the State and its territorial

[17] Statute, art. 38, ¶ 1(b), June 26, 1945 ("Customary" in international law is a form of states acting in a way that is "of a general practice accepted as law."), available at http://avalon.law.yale.edu/20th_century/decad026.asp#art38

[18] Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 TEX. L. REV. 785, 786 (1988), available at https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=66+Tex.+L.+Rev.+785&key=dc68fe9448058c5ba482d1fa3065942d

[19] (Lett., 2015) p.553.

jurisdiction. The historical lines and its origins as a philosophical principle can be drawn back to the works of 17th century philosopher Hugo Grotius, and to the 19th century efforts to combat piracy in the high seas.

Scholars often when writing about universal jurisdiction, rely so much on a particular side of historical development to explain the history of the principle of universality, which has become the standard model of explanation. This model starts with piracy, slavery and skips directly to Nuremberg. Universal jurisdiction was originally applied to hold pirates and slave traders accountable for their crimes, then now this principle widen to cover all serious human rights violations. The idea of universal jurisdiction was key in establishing accountability in several post-World War II trials following the International Military Tribunal at Nuremberg. Additionally, the obligation on states to seek out and prosecute those said to be responsible for grave breaches of international humanitarian law is a key aspect of the four Geneva Conventions of 1949. The principle was codified for torture in the 1984 Torture Convention.

Piracy

Piracy was for centuries the only universal jurisdiction offense. Its historical lines and origins as a philosophical principle can be drawn back to the 17th century philosopher Hugo Grotius, and to the 19th century efforts to combat piracy in the high seas.

"Since the municipal law of most nations condemned piracy, this gave rise to the acceptance of universality and the notion that it is a crime against the law of nations".[20]

Such jurisdiction was created for the protection of coastal States' own legitimate interests, also to protect common concerns.

It involves both a prescriptive and an enforcement component, which do however not necessarily coincide, e.g., the coastal State may adopt laws and regulations relating to innocent passage through the territorial sea in respect of a considerable number of activities,[21] but it may only enforce those laws there in limited circumstances.

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed.[22] That shows, universal jurisdiction for the crime of piracy is established in positive IL.

[20] (Kraytman, 2005) P. 99.
[21] Article 21(1) UNCLOS
[22] Article 19 U.N. Geneva Convention, 1958.

Slavery

Slavery has been associated with piracy since 1815 when the Declaration of the Congress of Vienna equated traffic in slavery to piracy.[23] Then there was a progressive development in the IL in relation with slavery and slave trade.

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[24]Thus, the universal jurisdiction was very important to combat slavery.

Nuremberg

Nuremberg is usually recognized as the birth of the modern form of universal jurisdiction, because it was followed by a few references to events that have become precedents since World War II, such as: the drafting of the Geneva Conventions, the development of multilateral human rights instruments, and the Eichmann Trial.

The first substantial development of the universal jurisdiction came in 1945, with the London Agreement and the creation of the criminal tribunals in Nurnberg and Tokyo. These were to prosecute individual criminal activity by leaders of the Axis powers during World War II.

Then, this principle kept developing with the establishment of the ad hoc criminal tribunals, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia. These two tribunals were to provide uniformity in the enforcement of international judicial jurisdiction.

Finally, the last stage of development started with the adoption of the Rome Statute in 1998 and its entry into force in 2002.

The Nuremberg tribunal introduced the idea of crimes against humanity from a concern that "under the traditional formulation of war crimes, many of the defining acts of the Nazis would go unpunished." This formulation of the crime was a novel innovation which recognized the primacy of international law by criminalizing certain acts "whether or not [they were] in violation of the domestic law" of Germany. In defining the crime, however, the proponents attached a war-nexus element to it in order to justify the extension of international jurisdiction over crimes committed exclusively within the territorial jurisdiction of Germany. The war-nexus requirement represented a compromise that balanced state sovereignty against matters of international concern. Under this construction, crimes against humanity could occur only within the context of a war.[25]

[23] (BASSIOUNI, 2002) P. 112.
[24] Article 1 (1) Slavery Convention, Geneva, 1926.
[25] (Sammons, 2003), p. 134

Chapter 2

1. Implementation of universal jurisdiction.

Universal jurisdiction is an exceptional basis of jurisdiction, it is "exercised unilaterally by a state" where the crime did not take place and may either "involve a third state or an international organization" or be exercised over crimes committed in international waters.[26]

1.1. Scope of application.

The principle of universal jurisdiction emerged as a convenient tool to combat piracy and slavery, but there exist some historical evidences of its legitimacy and consequential extension beyond piracy to prosecute serious crimes of international humanitarian law and human rights law.

Modern universal jurisdiction arises from the nature and the gravity of the crime – the grave crimes at least including some major categories: genocide, crimes against humanity, crimes against peace (aggression), war crimes and torture and perhaps certain acts of terrorism. [27] These crimes have been recognized worldwide as unacceptable acts punishable by law.[28]

All of these are found both in international treaties and, even more importantly in relation to the exercise of universal jurisdiction, in customary international law, demonstrated by state practice and jury's opinion.

The exercise of universal jurisdiction is not as widespread nor as accepted and supported by state practice as some scholars and human rights organizations present it to be.[29]It appears that reaching a comprehensive understanding of the meaning and scope of the universal jurisdiction is difficult in theory and practice.

The establishment of the ICC has the power to fill the gaps made by missing legislation to enact domestically human rights treaties already in existence internationally.

[26] (Lett., 2015) p.548.
[27] The Princeton Principles list that "serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture". See Principle 2(1) in Princeton University Program in Law and Public Afffairs, "The Princeton Principles on Universal Jurisdiction 28 (2001)"available at: http://hrlibrary.umn.edu/instree/princeton.html
[28] (Lett., 2015), p.548.
[29] see Human Rights Watch Report, Universal Jurisdiction in Europe, available at https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art

I. Genocide.

Genocide is just old as the humanity; it came into its own category as a crime after the Second World War. It did not exist before the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Thus, despite naming genocide as a crime that "shocks the conscience of mankind" several countries voiced opposition to adopting universal jurisdiction for genocide.[30]

Genocide is prohibited as a matter of international law because the Genocide Convention prohibits it, and defined it in Article (2) as following:

" genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[31]

Since the adoption of the Genocide Convention, two international ad hoc criminal tribunals were established, the ICTY (1993) and the ICTR (1994), then the Statute of ICC. All these statutes contain provisions declaring genocide as a crime within the jurisdiction of the court. But that, in itself, does not give these tribunals universal jurisdiction.[32]

II. Crimes against humanity.

Crimes against humanity were first defined in positive international criminal law in Article 6(c) of the Nuremberg Charter as:

"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated."

Crimes against humanity also obtained status in customary international law with the UN affirmation of the Nuremberg Principles. While General Assembly resolutions are not binding, they are sometimes, considered to be *jury's opinion* or custom.

[30] (Bassiouni) p.18.
[31] Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the United Nations General Assembly, 1948
[32] (Bassiouni), p.18.

There has not been a single international convention that dealt with prosecution of such crimes, and consequently no authoritative definition of the crime, until the drafting of the statutes for the *ad hoc* tribunals and the ICC.[33]

There was no specialized convention for crimes against humanity; but few States adopted national legislation allowing domestic prosecution such crimes, even when these crimes are committed outside the its territory and by or against foreigners.

III. War crimes.

In the past, war crimes were dealt with by courts martial. By contrast, modern international tribunals are fundamentally political. They are stuffed full of human rights activists who have never been in battle, and who are both politically motivated and politically correct.

The draft of the Four Geneva Conventions of 1949 was an important contribution towards defining "war crimes" in International Law.

The Statute of the International Criminal Court defines war crimes as:

"serious violations of the laws and customs applicable in international armed conflict" and "serious violations of the laws and customs applicable in an armed conflict not of an international character".34

The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor also provide jurisdiction over "serious" violations of international humanitarian law.35

In the case of the attack on Yugoslavia in 1999, even though there was no legal basis for that war. The ICTY has refused to open an investigation into allegations that NATO had itself committed war crimes against Yugoslavia.[36]

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[33] ICJ, Arrest Warrant (Congo v Belgium), 14 February 2002, Separate Opinion of Judge Guillaume, available at http://www.icj-cij.org/docket/index.php?sum=591&p1=3&p2=3&case=121&p3=5

[34] ICC Statute, Article 8 (cited in Vol. II, Ch. 44, § 3)

[35] ICTY Statute, Article (1); ICTR Statute, Article (1); Statute of the Special Court for Sierra Leone, Article (1/1); UNTAET Regulation No. 2000/15, Section (6/1).
See also: ICTY, Delalić case, Judgment, (ibid., § 111). in 2001, in interpreting Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia listing the violations of the laws or customs of war over which the Tribunal has jurisdiction, the Appeals Chamber stated that the expression "laws and customs of war" included all laws and customs of war in addition to those listed in the Article. The adjective "serious" in conjunction with "violations" is to be found in the military manuals and legislation of several States.

[36] Sending Blair to Prison, By John Laughland, *Daily Mail* , March 2, 2004, available at https://www.globalpolicy.org/component/content/article/168/36461.html

1.2. Obstacles to the exercise of universal jurisdiction.

Many serious obstacles can face the application of the principle of universal jurisdiction, these obstacles may restrain the conduct of investigations and the administration of justice for victims who have difficulty reaching justice in their country.

Here I will mention some of these obstacles which I think is the most important:

I. **Immunities.**

Article (7) of the Nuremberg Charter for the International Military Tribunal declares:

"The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

Prosecutions of crimes under universal jurisdiction challenge the sovereignty and the immunity of leaders to commit grave abuses within their own national borders.

As stated in Rome statute, prosecutions take place against whoever commits a crime regardless their position or immunities. That is one of the main reasons for the refusal of states to adopt the universal jurisdictions.
still, the world can overcomes this issue through the universal jurisdiction, for example: The ICJ issued arrest writ against the Congolese Minister for Foreign Affairs " Yerodia Ndombasi". He was accused of broadcasting speeches inciting racial hatred against Tutsi residents in the Congo.

II. Presence Requirement and the Possibility of Investigation.

The presence of the person who committed the crime on the territory of the country were the prosecution is initiated, is more likely to be impossible, in some countries, presence or anticipated presence is the precondition for an investigation to be opened by police authorities. The principle of universal jurisdiction does not require the presence or the participation of the suspect, the investigation can take even when the suspect is not within the country's territory, also the international law does not prevent a state from seeking the extradition of a non-national who is outside its territory, in order to try that person for international crimes.

III. Prosecutorial Discretion

Prosecutorial discretion in respect of international crimes is not a new phenomenon. it is substantial to whether an investigation, and prosecution of the suspect of an international crime will proceed.

The discretion is exercised by different authorities in each country, and each authority takes different approach and criteria to exercising this discretion, so it is difficult for victims to know with any authority a complaint will be investigated, or the reasons behind a decision not to open an investigation.

As Judge Daniel D. Ntanda Nsereko notes, in some countries the government may direct the prosecutor, while in other countries prosecutors may act of their own accord. In deciding if an investigation or trial is to be pursued, the prosecutor must take into account a series of considerations such as whether a prosecution is in the public interest and whether evidence can be obtained easily.37

IV. Subsidiarity

Courts in the territorial state that are able and willing to prosecute individuals for international crimes should have priority in exercising jurisdiction over the crimes. But the risk of ignoring the prosecution and widening the impunity gap in the state that must investigate the crimes occurred on its territory.

The adjudicative exercise of true universal jurisdiction is subject to a legal limitation of subsidiarity vis-à-vis one or more states directly concerned. Such limitation applies as from the end of the investigation stage and is, in turn, conditioned by the genuine will and ability of the state(s) of primary jurisdiction to investigate and, where appropriate, prosecute.[38]

For example, in a 2000 decision, the Spanish National Court held that Spanish courts could not exercise jurisdiction over crimes against humanity allegedly committed in Guatemala because there was a chance that Guatemalan courts would investigate the complaint in the future. And that could lead to the escape of the suspect.

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[37] Domestic Regulation of Universal Jurisdiction–The Role of National Prosecutors. by Amina Adanan [Amina Adanan is a PhD candidate at the Irish Centre for Human Rights, School of Law, NUI Galway.]

[38] Universal Jurisdiction over International Crimes and the Institut de Droit international, Claus Kreß, J Int Criminal Justice, 2006.

2. Universal jurisdiction over violations of IHL.

IHL is a branch of international law that aims to limit the effects of the armed conflict. IHL is inspired by considerations of humanity and reduction of human suffering.

IHL includes a set of rules established by treaties or custom, which seeks to protect persons and properties which are affected by the conflict, also it is established to limit the power of the conflict parties to use weapons. It includes: Geneva Conventions, and their Additional Protocols, Hague Conventions, as well as subsequent treaties, case law, and customary international law.

The main IHL treaties include the 1907 Hague Regulations, four Geneva Conventions, and their Additional Protocols. As follows:

1907 Hague Regulations, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.[39]

- I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF 12 AUGUST 1949.[40]
- II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF 12 AUGUST 1949.[41]
- III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUGUST 1949.[42]
- IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949.[43]
- Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
- Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
- Protocol III additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005.

[39] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/195?OpenDocument
[40] http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.30_GC-I-EN.pdf
[41] http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.31_GC-II-EN.pdf
[42] http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf
[43] http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf

IHL Main principles.

Distinction.

This principle protects civilian population and civilian objects from the effects of military operations. And oblige parties to an armed conflict to distinguish between military objectives, and civilians and civilian objects.

Necessity and proportionality.

This principle means that attacks on military objects must not cause loss of civilian life considered excessive in relation to the direct military advantage anticipated.

Humane treatment.

This principle requires that civilians be treated humanely at all times. The common Article (3) of the Geneva Conventions prohibits violence to life and person.

The principle of non-discrimination.

This is a core principle of IHL. That prohibits any distinction between people in treatment based on race, sex, nationality, religious belief or political opinion. And ensure that all protected persons shall be treated with the same consideration by parties to the conflict, without any distinction.

These principles have been affirmed by the ICRC as a norm of customary international law, applicable in both international and non-international armed conflicts.

Criminal law principles limit the jurisdiction of domestic courts to prosecute crimes that took place outside its territory or when the offenders or victims are nationals of that country.

It is obvious from the nature of the crimes under IHL, and the context in which they tend to be committed, that it is difficult to prosecute them in the courts of the country where they were committed.

The Rome statute was adopted on 1998. It clearly stated that the Court has jurisdiction over the most serious crimes of international concern—genocide, war crimes, crimes against humanity and aggression. Still, the Court's jurisdiction is constrained by many limitations. This leads to the importance of the reinforcement of domestic judicial capacities.

2.1. Crimes under universal jurisdiction.

The universal jurisdiction is applied to the violations of international humanitarian law that have occurred, and continue to occur, during armed conflicts, and these violations include: genocide, crimes against humanity and war crimes**.**

According to the Rome statute,

I. Genocide.

'Genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[44]

II. Crimes against humanity.

'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[45]

III. War crimes.

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the mentioned acts against persons or property protected under the provisions of the relevant Geneva Convention.[46]And, other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law.[47]

In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.[48]

2.2. Mechanisms of prosecution.

Enforcement of IHL happens at different levels and through different methods and mechanisms. Some mechanisms are obsolete, whereas others have taken important functions.

[44] Rome statute, Article (6).
[45] Rome statute, Article (7/1)
[46] Rome statute, article(8/2/a)
[47] Rome statute, article(8/2/b)
[48] Rome statute, article(8/2/c)

I. International Judicial Mechanisms

• International Court of Justice.

The World Court, It is the main judicial organ of the United Nations, It is located in The Hague, and hears only cases between States or provides advisory opinions, it applies all bodies of international law. That means it contributes to the implementation of humanitarian law through jurisprudence.

It can be called upon states request, to settle a dispute between states on the application of IHL so long as both states have consented to the Court's jurisdiction.[49] The ICJ's interpretations of IHL, judgments and opinions are influential and widely respected.[50]However, judgments are not necessarily implemented.

II. International Criminal Tribunals.

1. Ad hoc criminal tribunals.

International Criminal Tribunal for the Former Yugoslavia & Rwanda

Hybrid Tribunals: Established by Agreement between the United Nations and the Host nation or by virtue of a U.N. transitional authority[51]

The Ad hoc international criminal tribunals have received renewed attention with the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the United Nations (UN) Security Council.

These tribunals have been granted powers to hear cases addressing:

- Grave breaches of the Geneva Conventions, including willful killing, torture and inhumane treatment;
- Violations of the laws and customs of war;
- Genocide; and

49 STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Article (34) : Jurisdiction over disputes between states that have accepted its jurisdiction.

[50]. Nicaragua v. United States, 1986 ICJ Reports: holding that violations of IHL committed by the contras could not be attributable to the United States, because the United States did not exercise "effective control" over the contras, notwithstanding that the United States was "training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua."

[51]These tribunals are: Special Court for Sierra Leone, East Timor Special Panels, Bosnian War Crimes Chamber and Kosovo Panels, Extraordinary Chambers in the Courts of Cambodia, Permanent International Criminal Court.

- Crimes against humanity, such as murder, deportation, torture and rape.

2. Permanent International Criminal Court (ICC).

ICC is the first permanent international court; it was created based on the Rome Statute, which was adopted in Rome, Italy, on July 17, 1998. And entered into force on July 1, 2002, it is located in The Hague.

ICC has the right to investigate and bring to justice "individuals" who commit the most serious violations of international law; war crimes, genocide, crimes against humanity and the crime of aggression.[52]

2.3. Palestinian situation.

The situation between the State of Israel and the Palestinians is one of international armed conflict and belligerent occupation. Although the State of Israel has not ratified the Protocols.[53]it is legally bound to investigate and prosecute Israeli citizens accused of committing international crimes.

The "Universal Jurisdiction" outlines the inadequacy of the Israeli judicial system. It is presented that this system – in relation to Palestinian victims – does not meet the international standards.

It is obvious that the Israeli authorities considers that all Palestinians are enemies or 'potential terrorists', which prevent them from getting their rights of the presumption of innocence, and the right to a fair trial. That means Justice for Palestinians is not obtainable within this system.

In order to overcome the State of Israel's unwillingness to investigate and prosecute individuals suspected of committing war crimes, and the Palestinian lack of jurisdiction, victims need to refer to the principle of universal jurisdiction in prosecuting the Israeli violations, to ensure an effective judicial remedy.

[52] Article 5: Crimes within the jurisdiction of the Court
1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

[53] The Principle and Practice of Universal Jurisdiction, PCHR's Work in the occupied Palestinian territory, 2010, p.14.

On 22 January 2009, the PNA made a declaration with the Registrar of the ICC, recognizing the jurisdiction of the Court. Then the State of Palestine was declared an observer member of the United Nations at the end of November 2012.

Palestine became a State Party to the Rome Statute of the ICC on 1 April 2015, which vested the ICC with jurisdiction over crimes committed since 13 June 2014. The ICC has jurisdiction over genocide, crimes against humanity and war crimes.

This step is fundamental toward achieving justice, especially where systematic violations of the rules of IL and IHL continue against protected civilians.

Currently the Palestinian human rights organizations started to make use of the universal jurisdiction and the Palestinian membership of the ICC by delivering communications to the general prosecutor of the ICC.

- On 22 November 2015, four Palestinian human rights organizations delivered a confidential communication to Madam Prosecutor Bensouda of the International Criminal Court on behalf of themselves and Palestinian victims of Israel's "Operation Protective Edge". The communication, which was submitted by Al-Haq, Al-Mezan Center for Human Rights, Aldameer and the Palestinian Center for Human Rights pursuant to Article 15 of the Rome Statute, contains information on crimes jointly documented during Israel's 2014 offensive against the Gaza Strip.

- On 10 February 2016, four Palestinian human rights organizations whose mandate it is to pursue justice and accountability, delivered a communication pursuant to Article 15 of the Rome Statute to the Office of the Prosecutor of the International Criminal Court. Al Mezan Centre for Human Rights, Al-Haq, Aldameer, and the Palestinian Centre for Human Rights provided evidence of the commission of war crimes and crimes against humanity in Rafah between 1 and 4 August 2014 following the invocation of the controversial Hannibal Directive by the Israeli military forces. Unlawful attacks against the Palestinian civilian population and their infrastructure and property ensued, killing 255 Palestinians, including 212 civilians.

- 22 November 2016, The Hague, Palestinian human rights groups urged the Prosecutor of the International Criminal Court (ICC) to examine the Israeli closure of the Gaza Strip, which has denied two million Palestinians a panoply of fundamental rights for nearly a decade, as the crime against humanity of persecution under the Rome Statute. The Palestinian Centre for Human Rights (PCHR), Al Mezan Center for Human Rights, Al-

Haq, and Aldameer submitted a 145-page file to the ICC Prosecutor setting out the factual and legal basis for the case.[54]

Currently, The Prosecutor is engaged in a preliminary examination on the Situation in Palestine in order to determine whether or not to proceed into investigations of alleged crimes committed on the territory of the State of Palestine.

Here it is clearly apparent that the universal jurisdiction is a strongly useful principle to the Palestinian situation, helping the Palestinian victims of the Israeli attacks reaching justice and proper remedy.

[54] http://mezan.org/

Conclusion

Universal jurisdiction is an essential and important tool for achieving justice and accountability for the grave crimes recognized by the international law. This research shows that the universal jurisdiction is important for victims cannot obtain prosecutions in the territorial state of the suspect person, but still there is a gap between principle and practice which is slowly closing in most of the countries, because of the obstacles facing the practice of this principle.

Despite the progress made in the exercise of universal jurisdiction in recent years, states continue to be nervous about the political consequences of creating and using universal jurisdiction laws, there is still a real risk that states will try to fight the exercise of this principle, for example, by putting new limits on victims' ability to bring prosecutions against the suspects.

Thus, regardless all the constrains that face this principle, it still one of the most useful tools of international law to prosecute persons who committed grave crimes, this principle enable weak and poor victims to reach justice and to prosecute the most powerful people committing crimes and could not be prosecuted in their country.

Recommendations

As a conclusion to this research, the researcher recommends that:

States should, promote cooperation with each other in detecting, investigating, and bringing to justice persons suspected of having committed grave violations to the IL.

States should take adequate measures for the purpose of prosecuting crimes through the principle of universal jurisdiction

All states prosecuting offender on the basis of universal jurisdiction are obliged to comply with the generally recognized standards of human rights and international humanitarian law.

All governments shall work to have its own universal jurisdiction law, and create specialized units with practical powers to prosecute universal jurisdiction cases.

A general concept to be emerged to not prevent victims from pursuant private prosecutions under universal jurisdiction when this right is granted in domestic laws.

To the state of Palestine and the HR organizations in Palestine, to keep working on the universal jurisdiction to put an end to the Israeli continuing and increasing violations against the Palestinian civilians.

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